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Volume 108 Virginia.

Volume 108 of the Virginia Reports has been published and contains many important decisions of our Supreme Court of Appeals, some of great interest and novelty. As THE REGISTER has reported or digested the cases contained in this volume we shall only briefly allude to it. One hundred and eleven cases are reported—of which one hundred and six are civil and five criminal; of the civil cases, sixty-three are affirmed and forty reversed; of the criminal, three are affirmed and two reversed. It is quite remarkable that in the whole one hundred and eleven cases there are only two dissenting opinions—one of Judges Whittle and Buchanan in the case of Selden *v.* Williams at page 555. In this dissenting opinion these two judges seem to take the view that it was the hardship of the particular case which appealed to the majority of the court and that there was danger of overthrowing the principles of estoppel by decree if the opinion of the majority was adhered to.

The other dissenting opinion was that of Judge Buchanan in the case of Martin *v.* Richmond at page 773, in which the judge thinks that the construction which requires the word "all" to receive the narrow instead of its usual comprehensive meaning, ought not to be given by any provision of law unless there is some very strong reason for it. A great many lawyers throughout the State agree with Judge Buchanan in this view, especially when applied to the schedule of the Constitution in regard to the word "elections," but in the case of Willis *v.* Kalmbach, annotated in this number, Judge Harrison, who was of the majority in the Martin case, seems to have agreed with Judge Buchanan, whilst Judge Buchanan seems to have held that the word "all" is to be differently construed at different times. Of course there is really no parallel between the two cases, but if "all' means "all" it is hard to see why it should not apply as well in the Constitution as in the general law.

An Unmarried Woman—What Is?

The unanimous decision of our Supreme Court of Appeals in the case of Jennings *v.* The Commonwealth, decided March 18, 1909, 63 S. E. 1080, will at first sight take the profession by surprise. Jennings was indicted under § 3677, Va. Code, 1904, for having seduced, *under promise of marriage,* an *unmarried* female of previous chaste character. The female seduced was a divorced woman and Jennings was duly convicted by the jury and sentenced to two years in the State penitentiary. That conviction and sentence was reversed by the Supreme Court upon the sole ground that a divorced woman is not an unmarried woman and that the word "unmarried" in its ordinary and primary sense means "never having been married," and the statute being penal must be strictly construed. Granting that there is *nothing clearly indicating* that the legislature used the word in a larger sense, the decision is plainly right. More than a doubt must be raised.

An examination of all accessible cases fails to disclose that this question has ever been decided. Many cases say that the woman must be an unmarried woman when the alleged offense was committed, and that this must be affirmatively proven, but they all fail to define the term "unmarried," as to whether it means *never married* or *not in the married state at the time.*

> In State *v.* Wheeler, 108 Mo. 658, 664, it is said: "Without doubt, it was essential to a good indictment in this case, that it should be charged that defendant seduced an unmarried woman. The legislature in its wisdom has seen fit to give protection against this crime to unmarried women alone. 1 Bish. Crim. Proc., §§ 81, 86, 88." And again: "It is just as essential that it should appear by evidence in the case that the female was an unmarried woman, as it is to show she is of good repute. * * * We know of no presumption that a woman is unmarried in the absence of any evidence whatever on the point." This is the general tenor of the cases. In O'Neil *v.* State, 85 Ga. 383, 407, under a statute using the word "unmarried," the court, in considering the meaning of "virtuous," said: "We think that in contemplation of law, including the penal statute on the subject of seduction, every virgin, without exception, is virtuous. This is a plain, practical standard by which to test that chastity to which the law looks in classifying females who have never been married * * *. Of course a different standard would

have to be adopted in classifying women who have been married, such as *widows and divorced wives*. Possibly, also, a fallen woman who has reformed and been redeemed, * * * might stand on the footing, if not of a virgin, of a *chaste widow*." But in Wood *v.* State, 48 Ga. 193, 285, it is said: "A married woman is better skilled against the arts of the seducer than the ingenuous, simple-minded girl, and she cannot so surely be treated as the victim of a villain." The court was explaining why a married man could be guilty of the offense, while the woman seduced must be *unmarried*. And in Keller *v.* State, 102 Ga. 506, 513, it is said: "A woman who has never been married, and who has never had sexual intercourse, is in law virtuous, in the sense that she may be the victim of seduction." But the court was here considering the meaning of "virtuous," not "unmarried."

The logic of this decision by our court of appeals must exclude widows as well as divorcees from the protection of the statute, and if it be urged that the passions of women of these two classes are stronger than in the never-married, virtuous female, the answer is that where the motive of the act is the gratification of desire on the part of the female, this has never been regarded as seduction under such statutes. (See Flick *v.* Com., 97 Va. 766, 34 S. E. 39.) It is very hard to get away from the logic of this decision, but we think this nice distinction could hardly have been in the legislative mind when the act was passed. The act was an attempt, as those who recall its passage will remember, to furnish a substitute for the so-called "Unwritten Law." The seduction of a woman of previously chaste character *"under promise of marriage"* it would seem to us is the gravamen of the offense, and that a woman who had once been married was as liable to yield to the arts of the seducer under such a promise as a virgin, seems to us to be of very little doubt.

Our court seems to take a different view: "The case is wholly different with women who have been married. They have known man: and possessed of the knowledge which such intercourse imparts, if chaste, are immune from the seducer's wiles." P. 195. The question of "immunity" it seems to us hardly enters into this case. If "immune from the seducer's wiles" is she to be considered equally immune from the suggested "promise of marriage?" Otherwise the conclusion of the court is hardly justified.

An Additional United States Circuit Judge.

At the meeting of the West Virginia Bar Association held last December, resolutions were unanimously adopted recommending that the number of Circuit Judges for the 4th Judicial Circuit consisting of Maryland, West Virginia, Virginia, North Carolina, and South Carolina should be increased to three, and the report of that Association from the Committee on Judicial Administration and Legal Reform makes out an exceedingly strong case for such a creation and appointment. There are eight district judges in the five states mentioned; there are only two circuit judges—Judge Goff of West Virginia, and Judge Pritchard of North Carolina—and we note that Judge Pritchard of North Carolina seems to have sat oftener in Virginia cases than Judge Goff. The committee with a great deal of force says:—

"The new and expanding jurisdiction under progressive Acts of Congress, reaching into new subjects, creates a mass of difficult questions, and an increasing volume of litigation that devolve on the Federal judges a labor and a responsibility wholly out of proportion to the working force. The very magnitude of the interests, and the intricacies of detail and procedure, render the duties burdensome, while the novelty of the problems, and the perplexities besetting the judge, call for relief and greater opportunities for deliberation. In the Court of first instance, in the District or on the Circuit, the best abilities of the strongest jurist have full employment; and it is familiar knowledge to the profession that the administration of justice depends more upon the trial Court, than upon the Court of review—the avoidance of errors, rather than their correction; and the most fruitful cause of miscarriage of justice lies in the mistakes committed below, and most likely to be caused by over-pressure and lack of time.

"When, therefore, a District Judge is called from his regular duties, to sit on the Court of Appeals, his own courts must suffer. As soon as released from Appellate service, he must hasten back to his allotted tasks; and other District Judges take up the higher roll.

"The existing conditions are not ideal for obtaining the best results, where the Appellate Court is made up of judges who undergo the imposition of this extra service, of temporary character and arduous strain, and sit in review of the acts of each other, in a court of a rotating, changing

> membership, composed of gentlemen taken from home, provided with no conveniences, placed at a disadvantage, pressed for time, denied opportunity for conference or mutual discussion, and hurried away to work out, amid exactions of hardship, a written solution of matters to be submitted by mail or express to the different groups that constitute the court from day to day."

It seems to us that this is a matter which certainly demands the attention of the Senators and Representatives in Congress from the States named. We suppose that in the States of Maryland and Virginia put together there is probably as much litigation in the United States Courts as in the other three States put together, although West Virginia has large and constantly growing litigation in the Federal Courts. It seems to us that there should certainly be another Circuit Judge, to be selected from the States of Maryland or Virginia. Within those two States are found the three largest cities in any of the five States and litigation in Federal Courts comes largely from the cities, especially in matters involving maritime jurisdiction. We trust that the various Bar Associations of the States named will adjust this matter and bring pressure to bear upon their Senators and Representatives to have this very necessary addition made to our Federal Judiciary.

West Virginia Bar Association.

We have received and read with much interest the proceedings of the 24th annual meeting of the West Virginia Bar Association held on December 29th and 30th of last year at Huntington, West Virginia. As we have said once or twice before in alluding to the proceedings of the brethren of our daughter State, the lawyers discuss fully and freely the papers read before them, which renders the report of the proceedings not only useful but exceedingly interesting. We would that the Virginia Association would take a leaf out of their "grandchild's" book. The annual address was by Judge S. E. Baldwin, Chief Justice of the Supreme Court of Errors of the State of Connecticut, upon "The Narrowing Circle of Individual Rights." We cannot forbear quoting a portion of this admirable address,

as we think very few lawyers have considered for a moment the way in which a democracy such as ours has regulated the activities of the individual. Alluding to the restrictions upon individual rights in some of the different states, the judge says:—

"The manufacturer finds his field of activity contracting. In one state he cannot distill or brew. In another he cannot make a cigarette.

"Formerly if an employer preferred to have none in his service who did not share his political options, he could discharge such as voted against the candidates of his choice at public elections. Now the State may be found punishing him for so doing by fine or imprisonment.

"Once every public official was free to take an active part in political campaigns. Now it would be a cause of removal in the case of very many.

"Once every man's house was his castle, subject to the right of the State to take it from him for the strict purposes of government on making him just compensation. Now the State may thus seize it for a pleasure ground, a band stand, a memorial site, a hospital, a college, a free library.

"Once his farm was his own, to plant and till as he might please. Now some public official may invade his orchard, uproot his trees, and leave him without remedy, if the State deems it necessary or expedient for the public welfare.

"The owner of a wood lot was formerly free to cut it when he pleased and as he pleased. He may now be ordered by the Legislature to refrain from cutting the whole or part of the natural growth for a period of years, and left to find his compensation only in the fact that this is deemed to be for the greatest good of the greatest number.

"If one owns land from which comes oil or natural gas, he must, on the one hand guard against waste, and on the other refrain from increasing the natural flow to the prejudice of his neighbors. Similar statutes have been upheld in reference to the use of water from artesian wells.

"The riparian proprietor on streams not navigable has long been compelled in many States to submit to the flooding of his land by others, to create water power for them to put to milling or manufacturing purposes. He now finds his fishing rights curtailed or perhaps denied for years, in order to secure replenishing the stream with more fish for others to catch and eat.

"A grazier or butcher could formerly dress his meat products for such purposes as he saw fit. Now, if he should use his tallow to make a cheap substitute for butter, he might find

himself under arrest as a criminal, and liable to a sentence to imprisonment.

"Once a man could educate his children as he pleased, or not all. Now the State may compel him to educate them in a certain way.

"In obedience to its commands, he sends them to a public school, and the State may refuse to receive them unless they are submitted to vaccination, although he may regard it as both unnecessary and dangerous.

"He may think that he provides them at home with food sufficient for their wants, but if a school committee think other wise, he may be forced to pay for other means furnished by them and charged to him.

"Formerly a private school could be open to all whom the master thought fit to receive. Now it may be made a criminal offense to admit children of different colors.

"Once if a man contemplated marriage, no considerations of personal health need debar him from a free choice. Now the State may forbid him, under heavy penalties, from marrying an epileptic, or one of feeble mind."

The judge might have added that in some of the States a father is punishable with fine and imprisonment if he gives his minor child a glass of claret or beer at his own table, and a student of any college or institution of learning, no matter if he be fifty years of age, cannot be given, sold, or furnished any wine, malt liquor, or intoxicating beverage without rendering the giver, seller or furnisher liable to punishment at the hands of outraged justice.

The Turntable Cases in England.

The "tight little island" has always been noted for her slow way of doing most things. The "turntable case," so called, seems just to have reached her courts, as can be gathered from the following note from the *London Law Journal.*

The decision of the House of Lords this week in Cooke *v.* The Midland and Great Western Railway of Ireland, which overrules the judgments of the Irish Court of Appeal, does not establish any new principle of the law of negligence, but reasserts and enlarges the rule laid down in the leading case of Lynch *v.* Nurdin (1841), that where a person negligently leaves about anything of a dangerous character or which may do or cause injury, he is liable for all the reasonable

and probable consequences arising from his negligence. The respondent company allowed a disused turntable to remain unlocked and unguarded on a waste piece of ground out of sight of the station, though for some time there had been a large hole in the fence bounding this ground, and it had become the fixed habit of the children in the neighborhood to break through the fence and play about the turntable. The plaintiff, who was a seven-year-old child, was taken there by two friends little older than himself and given a ride on the turntable, when he crushed his leg against a dwarf wall situated at the end of it, and the limb had to be amputated. The question at issue was whether the company were liable for negligence in leaving this dangerous plaything in such a condition as was likely to attract the "youth of Navan" to make use of it to their own danger. The Irish Court distinguished the case from Lynch *v.* Nurdin, on the ground that the unattended horse and cart which there was the cause of the injury to the child was a nuisance on the highway, whereas here the dangerous thing was situate on the private property of the company. But Lord Macnaghten pointed out that the ground of Lord Denman's decision in the earlier case was not that the cause of the mishap was a nuisance, but that it was in such a position as to tempt children to disport themselves with it, and the owner was liable for any mishap which might arise. It is immaterial whether the child came upon the dangerous thing merely unjustifiably or by trespass, or whether the thing was in a public place or on private ground; or, again, whether an adult would have been likely to suffer harm from it. The owner will be liable in every case if he has not taken such precautions as a prudent person would take to prevent injury occurring to any class likely to be affected by the unguarded condition of his dangerous property. A railway company must take account of the careless and mischievous habits of young boys, and it cannot plead either their contributory negligence or wrongful conduct in extenuation of its own negligence.

It will be seen from this decision that the House of Lords adopts the majority rule, and adds one more strong authority to those decisions holding the companies responsible for accidents similar to the one described.

REHEARING.

A rehearing has been granted in Standard Peanut Co. *v.* Wilson, 63 S. E. 430 (see April LAW REGISTER, p. 977, for syllabus of decision).